

Pages 1 - 32

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

| | | |
|-------------------------------|---|---------------------------|
| MICHAEL ZELENY, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | NO. C 17-7357 RS |
| |) | |
| EDMUND G. BROWN, JR., et al., |) | |
| |) | San Francisco, California |
| Defendants. |) | |
| _____ |) | |

Thursday, June 13, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

AFFELD GRIVAKES LLP
2049 Century Park East
Suite 2460
Los Angeles, California 90067
BY: DAMION D. ROBINSON, ESQ.

For Defendant New Enterprise Associates, Inc.:
FOLEY & LARDNER, LLP
111 Huntington Avenue
Suite 2500
Boston, Massachusetts 02199
BY: ROGER A. LANE, ESQ.

Reported By: BELLE BALL, CSR 8785, CRR, RDR
Official Reporter, U.S. District Court

Thursday - June 13, 2019

1:42 p.m.

P R O C E E D I N G S

THE CLERK: Calling Case C-17-7357, Zeleny versus Brown. Counsel, please come forward and state your appearances.

MR. ROBINSON: Good morning, Your Honor. Damion Robinson for plaintiff Michael Zeleny.

THE COURT: Good afternoon.

MR. ROBINSON: Good afternoon; I apologize.

MR. LANE: Good afternoon, Your Honor. I'm Roger Lane of Foley & Lardner for the moving party on defendant New Enterprise Associates.

THE COURT: Good afternoon.

MR. LANE: Good afternoon, Your Honor.

THE COURT: So this matter is on for the motion to dismiss the first amended complaint, and against -- to the extent it's against NEA in its claims, I believe, 6 and 7.

It appeared there were three issues we really need to talk about, or at least this comes down to. The statute of limitations question; the Noerr-Pennington issue with respect to the sixth claim, the 1983 claim; and then whether or not we've got a protected class properly identified for purposes of the 1985 claim.

So, I can tell you that I have read through your papers. I can give you a little bit of an indication of how I think it

1 shakes out. But certainly, you can address all of these
2 things.

3 The statute of limitations question kind of boils down at
4 the end to delayed discovery, and whether or not there is a --
5 an argument here that there was some basis to claim delayed
6 discovery. Because on its face, there's some -- there doesn't
7 appear to be any overt act after March 29th of 2017, when --
8 which would be kind of the triggering event.

9 That said, I'm not -- right now, as I sit here, I'm not
10 inclined to think the statute of limitations is the -- is a
11 basis to grant the motion.

12 That said, on the other two I am more inclined to -- the
13 notion that granting the motion is appropriate. On the
14 Noerr-Pennington claim, I think the bulk of that, the NEA is
15 right, with respect to Noerr-Pennington.

16 The one question I have, and you will -- perhaps can ask,
17 focus on this, counsel for NEA, is the argument that NEA
18 falsely told the police that Mr. Zeleny was using drugs to --
19 according to the complaint, to justify the seizure of his
20 weapon. Whether or not that would have any kind of
21 Noerr-Pennington protection to it, or why that otherwise isn't
22 something I have to worry about.

23 Finally, with respect to the 1985 claim, I do think there
24 is a problem on the seventh claim for relief, to the extent
25 that there really isn't a suspected -- suspect classification

1 that's identified. I don't know lawful gun owner or those who
2 protest violence against women are protected classes. And so,
3 I think the 1985 claim has a real problem.

4 So the defendant NEA is the moving party, so I'll let you
5 begin. So Mr. Lane?

6 **MR. LANE:** Thank you, Your Honor. I appreciate your
7 providing time for us to be heard.

8 Let me start with the Noerr-Pennington question that you
9 have, if you wish.

10 **THE COURT:** Sure.

11 **MR. LANE:** And I'm just trying to find very quickly
12 where that arises in the pleading.

13 **THE COURT:** Well, I had it noted in my notes, but I
14 don't have a cite reference --

15 **MR. LANE:** Okay.

16 **THE COURT:** -- for you. I do think -- and so as an
17 initial matter, is it your understanding, you don't think that
18 that is -- that averment is made?

19 **MR. LANE:** I do not think that averment is made.

20 **THE COURT:** Okay.

21 **MR. LANE:** And in fact, I think when you look at it,
22 what you see is that an averment is made that false
23 information was reported. Sort of passive voice. It's not
24 alleged that NEA did it. NEA didn't do it. I can tell you
25 that.

1 And that's not here on a pleadings motion, but it caught
2 my eye because -- it caught my eye that it was not actually
3 averred that NEA did that.

4 Now, if Mr. Robinson can point me to the paragraph, I
5 could be more concisely responsive to Your Honor, more directly
6 responsive.

7 **THE COURT:** And you're now talking about the question
8 that I had about --

9 **MR. LANE:** That's right.

10 **THE COURT:** -- advising the police with respect to
11 the claim of drug -- drug use.

12 **MR. ROBINSON:** It's 139(a), Your Honor. And it
13 alleges NEA falsely accused Zeleny of using drugs.

14 **THE COURT:** Okay. Does it say anything about it --
15 then telling the police of that?

16 **MR. ROBINSON:** Yes. Well, NEA falsely accused Zeleny
17 of using drugs, which the City believed it could use to seize
18 Zeleny's firearms.

19 **MR. LANE:** I see that now averred, so I stand
20 corrected. Thank you for that.

21 Your Honor, under the Noerr-Pennington doctrine, if a
22 private party calls on police out of concern, to report a
23 concern that they have, whether it's well-founded or
24 ill-founded, that's classic petitioning activity.

25 **THE COURT:** How about, though, if it's -- in this

1 instance, it's averred that it's just deceptive. I mean, is
2 there any Noerr-Pennington protection if you intentionally lie
3 to the police?

4 **MR. LANE:** That, I -- Your Honor, with your leave,
5 that, I would have to research. Because I don't think we
6 focused on that particular issue.

7 **THE COURT:** You didn't interpret that averment to be
8 making that claim.

9 **MR. LANE:** No. We interpret it to be there was a
10 report of drug use by Zeleny that the police used for this
11 reason.

12 **THE COURT:** Well, let me ask. Go to Mr. Robinson.
13 Are you -- is the nature of your averment that NEA had no
14 reason to believe Mr. Zeleny was engaging in drug use, but they
15 so advised -- tipped off -- the police, and apparently for the
16 reason that they wanted the police to seize his weapon?

17 **MR. ROBINSON:** Yes, Your Honor. And, and to be a bit
18 careful, I have not looked at the email that that stems from,
19 before today's hearing. But, yes. The context and the
20 substance of what was being said is: Here is -- you know,
21 Zeleny is using drugs; you can use this to take his firearms
22 away.

23 **THE COURT:** And your claim is that NEA had no reason
24 to believe that to be true.

25 **MR. ROBINSON:** No legitimate reason, Your Honor.

1 **THE COURT:** Okay. Well, let's stay with the sixth
2 claim for relief. And that was a -- that was a particular
3 question I had with respect to Noerr-Pennington. But more
4 generally, if you wanted to talk about Noerr-Pennington, go
5 ahead, Mr. Lane.

6 **MR. LANE:** I'm happy to do so, Your Honor. And allow
7 me just a moment to flip to my notes.

8 (Reporter interruption)

9 **MR. LANE:** Oh, forgive me. Am I too quiet? I've
10 been accused of that.

11 **THE COURT:** That's seldom something that people get
12 accused of in this courtroom.

13 **MR. LANE:** And counsel.

14 **THE COURT:** So, I don't mind if counsel is too quiet.
15 Go ahead.

16 **MR. LANE:** Your Honor, the Noerr-Pennington doctrine
17 applies to any concerted effort to sway public officials, as
18 the Court knows. And this is so, regardless of the private
19 citizen's motive or intent. And it includes advocating one's
20 point of view regarding one's business or economic interests.
21 It is not limited to political issues.

22 So in this case, submitting information to a legislative
23 committee or advocating that the City do so, meeting with City
24 personnel to air grievances, to express concerns, to seek to
25 have them take action as to matters with which you take issue

1 is all core First-Amendment petitioning activity.

2 **THE COURT:** Then we have the sham exception.

3 **MR. LANE:** And then we have the sham exception. And
4 here, plaintiff -- pardon me, defendant -- or plaintiff,
5 that's right. I'm all confused.

6 There are two key points here, Your Honor. Contrary to
7 plaintiff's suggestion, where Noerr-Pennington immunity is at
8 issue, a plaintiff's complaint must contain specific
9 allegations that Noerr does not apply. It is not a
10 notice-pleading kind of issue. And that's in our law.

11 Here, the plaintiff specifically seeks to invoke the
12 judicial sham exception, as you noted. And that requires
13 pleading one of three things. Advocacy before a tribunal. Or,
14 a pattern of submitting multiple petitions without regard to
15 their merit.

16 **THE COURT:** I suppose the first one is the one that
17 would cover the argument, if such is being made, that you --
18 you don't know that someone is a drug user, and you just claim
19 it just to get the governmental entity to do something.

20 **MR. LANE:** And that's what I would seek leave to
21 further look into and focus authority on that, if you wish,
22 Your Honor.

23 **THE COURT:** Okay.

24 **MR. LANE:** I'd be happy to do that. And the -- and
25 the final one is: Misrepresentations that deprive the

1 proceedings of their legitimacy. That is, untruths that led
2 the tribunal astray.

3 Now, plaintiff's allegations do not even approach these
4 criteria, we respectfully submit. There's no allegation that
5 NEA even appeared at or participated in any quasi-judicial
6 proceedings. And the allegations that NEA behind the scenes
7 allegedly advocated for its interests with the City and others
8 is classifying protected activity.

9 There's no allegation NEA ever appeared before the City
10 Council, which is the relevant tribunal here; ever presented a
11 paper; or advocated of anything to the City Council. So we
12 don't see how the sham judicial exception could apply in these
13 circumstances. It just doesn't fit, we submit.

14 **THE COURT:** Why don't I have Mr. Robinson talk about
15 Noerr-Pennington.

16 **MR. LANE:** Very well.

17 **THE COURT:** And then we will go to the other issues.

18 **MR. LANE:** Thank you.

19 **MR. ROBINSON:** Thank Your Honor. I want to take up
20 where Mr. Lane left off, which is the assertion that NEA did
21 not engage in any advocacy before the tribunal. That's
22 correct. NEA never engaged in any advocacy. I won't read you
23 from the brief, because Mr. Lane just said the same thing.
24 Never appeared at the City Council, never took part in the
25 proceedings.

1 Noerr-Pennington depends on the exercise of a First
2 Amendment petitioning right. The reason there is a
3 Noerr-Pennington doctrine is to protect people who do things
4 like go to city council meetings and advocate their position.
5 Without a protected First Amendment activity, Noerr-Pennington
6 does not apply.

7 Stepping a little bit further, the suggestion that what we
8 are arguing about is NEA advocating to the City to do certain
9 things in private meetings is not completely accurate.

10 What we have alleged, and I think -- I would suggest that
11 we could further allege, based on the evidence, is that NEA and
12 the City agreed to derail the permitting process. Not that
13 they said: We're going to advocate for our position; you
14 should deny the permit. There are good bases to do that.

15 What happened was that NEA and particularly Chief Bertini
16 agreed: We're not going to let Zeleny make his way through
17 the ordinary process of permitting. It's an attack on the
18 process, not the outcome.

19 And Noerr-Pennington is designed to let people, whether
20 it's commercial interests, very bad interests, whatever
21 interests you want, to go in and advocate for a position, and
22 use an official proceeding for its intended purpose. And you
23 have extensive latitude to do that. You can take ridiculous
24 positions, racist positions, some of the case law suggests.
25 Whatever the motive is is not at issue. But what is at issue

1 is that the party claiming Noerr-Pennington immunity has to be
2 using the proceedings to reach an outcome. Not subverting the
3 proceedings, which is what occurred here.

4 And I want to take --

5 **THE COURT:** Well, but isn't the -- if I'm reading the
6 averments correctly, part of what NEA is doing is they don't
7 want open display of firearms near their offices. And so they
8 are -- they are sincerely trying to have your client stop
9 doing that.

10 Isn't that petitioning the governmental officials to, you
11 know, take his permit away, or don't give him a permit, or --
12 isn't that kind of the heart of Noerr-Pennington?

13 **MR. ROBINSON:** So I think it's correct that they
14 don't want Zeleny protesting outside their offices. There's
15 no dispute about that.

16 **THE COURT:** But further than that, it's not just they
17 don't like him. They don't want him -- they don't want people
18 with -- openly displaying firearms near their facility.

19 **MR. ROBINSON:** I have no doubt that would be NEA's
20 position. I -- I -- our focus is that it's the content of the
21 message that's at issue. It's what Zeleny is protesting
22 about. And NEA may disagree, and the City may disagree. But
23 for Noerr-Pennington purposes I want to just focus on the
24 first prong. So advocacy as part of a governmental process
25 that's baseless and an attempt to stifle.

1 The permitting process was used to stifle Zeleny. It's
2 not as though Zeleny went through an ordinary appeal process
3 with the City. The process was delayed. The process was
4 intercepted by Chief Bertini, who had these meetings and
5 agreements with NEA, where they talk about finding a solution
6 to Zeleny.

7 **THE COURT:** Well, the permitting issue, though, would
8 only go the firearm, right? I know that, from what I've read
9 here, his, his beef, if you will, with NEA is related back to
10 this notion of someone who he thinks was associated with NEA
11 that then abused that person's daughter. Right?

12 **MR. ROBINSON:** Right.

13 **THE COURT:** So the substance of that protest is
14 separate and apart from firearm carriage. Isn't it?

15 **MR. ROBINSON:** It's the same protest. Meaning
16 Zeleny -- Mr. Zeleny is protesting, carrying the firearms.
17 And he's been doing that since 2010. That is part of his
18 protest. And --

19 **THE COURT:** Yeah, but I guess where I was going,
20 where my question was going was I thought you were suggesting
21 that NEA was conspiring with the government officials, sort of
22 using the -- the gun-carrying question as a pretext, but what
23 they are really trying to do is to stop this protest about
24 this person and the person's daughter and that connection to
25 NEA.

1 **MR. ROBINSON:** That's correct, Your Honor. The --

2 **THE COURT:** Which is correct?

3 **MR. ROBINSON:** That the -- the firearm-open-carry ban
4 is being used for a content-based prohibition on Zeleny. It's
5 being used to prevent him from protesting this activity by --

6 **THE COURT:** Why can't he then -- I mean, that's where
7 I'm -- the disconnect, I'm not quite seeing it. If they --
8 they don't -- you agree with me that maybe one of the
9 motivations is: We don't want people with -- carrying
10 firearms around our building. Mr. Zeleny can still protest.
11 He can stand out there with a big sign that says: These
12 people are terrible because they harbor someone who abuses
13 their -- their daughter. They're not trying to stop him from
14 doing that. They're only trying to stop him from carrying the
15 weapon.

16 **MR. ROBINSON:** I -- that's not what we have alleged,
17 Your Honor. What we've alleged is that they are trying to
18 stop him from carrying the signs and getting out his message.
19 And --

20 **THE COURT:** But his not getting a permit wouldn't
21 stop him from -- he could still go out there with a big sign,
22 couldn't he?

23 **MR. LANE:** (Nods head)

24 **MR. ROBINSON:** That's the City's position. But, with
25 one caveat which is the City -- Chief Bertini has said: I

1 find your big sign offensive, and I'm going to prosecute you
2 for obscenity if you bring your big sign.

3 **THE COURT:** That's a different issue.

4 **MR. ROBINSON:** It's all the within the context of the
5 same protest. The carrying of firearms is part of his
6 protest. He is carrying firearms to draw attention to the
7 protest.

8 **THE COURT:** Well, okay. I understand that. But what
9 I'm trying to focus on is -- is you sort of can't have it both
10 ways. If your suggestion is NEA is -- doesn't -- is -- NEA is
11 not acting in its sincere effort to stop firearms from being
12 displayed around their building, what they're really doing is
13 they're trying to silence Mr. Zeleny, but at the same time
14 what they -- you say they are doing wouldn't silence him, it's
15 a bit of the -- or at least, it wouldn't stop him from
16 protesting; it's -- there's a disconnect there in my mind.

17 Now, I understand you somehow think they are inextricably
18 interlinked, the firearm and the protest about this person.
19 And I'm having trouble understanding the linkage. The linkage
20 to the extent that you're suggesting, if I'm reading the
21 averments right, that there's this pretext of what they're
22 really -- what NEA is complaining about.

23 And that's what I don't -- because I think at the end of
24 the day, when I read your averments, and it says: NEA is
25 engaged in petitioning the government officials because -- to

1 -- to not allow this person to display openly firearms around
2 their building, that seems to me to be a legitimate protest --
3 or a legitimate petition.

4 And you sort of indicate: Yeah, they can take that
5 position. But that's not -- then you're saying: But that's
6 not what they are doing here. They're really trying to stop
7 something different by using that tack.

8 Do you understand what I'm -- I know it was a garbled
9 question, I apologize.

10 **MR. ROBINSON:** No, I understand Your Honor's
11 question. And it's a fair point. And so what we've suggested
12 is -- and what we allege in the pleading is that NEA's desire
13 is to stop Zeleny's protest, based on the content. That's the
14 allegation.

15 **THE COURT:** And the content being the dispute about
16 this fellow and his daughter.

17 **MR. ROBINSON:** Correct.

18 **THE COURT:** Okay.

19 **MR. ROBINSON:** And so, rather than petition the City
20 and say, you know: Stop him from protesting, what's happened
21 is that the -- the NEA and the City have essentially subverted
22 the permitting process, itself. That's the allegation. So
23 the way that this -- and have done so, in order to stop Zeleny
24 because of the content of his message.

25 So that's the allegation, is that -- and the ways that

1 this happened were -- it wasn't as though NEA came to the City
2 Council and said: Don't do this, or went to Bertini and said:
3 Don't let him do this. What happened was that Bertini
4 intercepted Zeleny's permit application. The City sat on it
5 for an extended period of time, rather than processing it in
6 the ordinary course. The City continued to pepper him with
7 requests for information.

8 And I should say, sat on it for a length of time in order
9 to allow other permits that Mr. Zeleny had to expire, so that
10 he couldn't do the protest. Peppered him with questions and
11 requests for information to -- that are never required.

12 People get these kind of permits by submitting a
13 hand-drawn map that says: We'll have -- my favorite one was:
14 We'll have yoga or some other activity. And the City
15 rubber-stamped that. So it peppers him with questions: What
16 kind of generator are you using? What kind of screen? How are
17 you going to set this up? What kind of truck do you bring?
18 And then uses that to create a set of excuses to delay, defer,
19 and ultimately, deny.

20 That is not Noerr-Pennington. That is not somebody going
21 and advocating for a body, publicly, privately or in any other
22 capacity. It is NEA speaking with City officials, conspiring
23 with City officials to use the process, rather than the outcome
24 of that process, to stifle Zeleny's protest.

25 It's not a: We've advocated and we made

1 misrepresentations, or we got it wrong somehow and that
2 resulted in an outcome that was wrong. That's not what we're
3 arguing about. What we're arguing about is that the process
4 has been conscripted as a tool to delay, defer, and ultimately,
5 stop Zeleny, which is the object of the conspiracy that we
6 allege, based in 2009, when the conspiracy started. And we
7 have emails indicating that that was the aim of the conspiracy.

8 So the process is not being used as a legitimate
9 administrative process to reach an outcome. It's being used to
10 delay and defer and deny, on content-based grounds, to
11 forestall Zeleny from resuming his protest. And that falls
12 within the first prong of the Noerr-Pennington sham exception.

13 And in fairness, when we initially filed the first amended
14 complaint, we didn't include all of the allegations about, you
15 know, how the process specifically was subverted, and how the
16 City officials didn't comply with standard procedures, and how
17 things were completely outside of the bounds of the ordinary
18 permitting process. The reason for that is that we were making
19 the amendment by stipulation, so couldn't amend the substance
20 of the allegations against the City. But I think we have more
21 than sufficient facts to be able to do that.

22 And if Your Honor is inclined to rule based on the sham
23 exception, I would suggest: Let us put all the facts in.

24 **THE COURT:** Okay. Mr. Lane.

25 **MR. LANE:** Your Honor, if I heard Mr. Robinson

1 correctly, the assertions he's now making about NEA's
2 participation in the permit process are not in the pleading.
3 And they are not.

4 The pleading does not allege that NEA did anything in the
5 permitting process. It only alleges, I believe at the end of
6 Paragraph 139(d), that NEA participated in meetings that
7 resulted in a plan to try to deny Zeleny's application or
8 appeal through the appeal process. Something to that effect.
9 That's just an allegation that the conspiracy continued. It's
10 generic and conclusory. It is not an allegation of any
11 actionable overt act by NEA.

12 And so on its face --

13 **THE COURT:** So that's a statute-of-limitations issue.

14 **MR. LANE:** It is a statute-of-limitations issue.

15 It's also a failure-to-state-a-claim issue. Because if -- in
16 the absence of an overt act, a general allegation that the
17 conspiracy continued not only can't save it under the statute
18 of limitations, but you've not alleged any actionable conduct
19 on the part of NEA. All that's implicit in that is that there
20 were discussions and meetings with the City. Or the police
21 department, as the case may be. And that's classic immunized
22 conduct, for NEA to go in and say, in words or substance:
23 There's been a fella outside our door who has enough ammo to
24 shoot through our plate glass and kill everybody here. We
25 would like that issue addressed in this environment of fatal

1 workplace and school violence.

2 Nothing that is unprotected under *Noerr* is alleged in this
3 complaint. Nor, we submit, can it be.

4 **THE COURT:** On that last piece, Mr. Robinson is sort
5 of saying, if I heard him correctly: Well, if you are
6 inclined to go with the NEA side on that, he wants leave to
7 amend.

8 **MR. LANE:** (Nods head)

9 **THE COURT:** And you're suggesting that he shouldn't
10 be allowed to do that?

11 **MR. LANE:** I submit -- I know that this Court often
12 gives the plaintiffs one chance to amend. Plaintiff here has
13 already amended once. Granted, it was to add the claims
14 against NEA for the first time.

15 What's unusual here, Your Honor, is plaintiff has had
16 discovery from the City. The City produced its documents.
17 Hundreds, thousands of pages. Mr. Zeleny's counsel deposed
18 Commander Bertini. We produced NEA's documents under the terms
19 of Judge -- Magistrate Judge Hixson's order. And those were
20 turned over. And yet, all we see in this amended complaint is
21 inadequate.

22 If the plaintiffs wanted to -- having had not just a
23 chance to plead, but also to get pre-complaint discovery, it
24 seems to us that that could be and should be the end of the
25 story.

1 And when you add to that things like -- which we haven't
2 come to yet, granted -- the 1985 issues, the
3 statute-of-limitations issues, it -- this case needs to move
4 forward. And we respectfully submit it would be appropriate if
5 it moved forward without NEA. Because the core allegations are
6 that the City denied Mr. Zeleny his permits, and that he did
7 not prevail on appeals of that activity.

8 And after all this time, there's no allegation that NEA
9 had its fingers on the scales in any inappropriate way. Other
10 than expressing its concern for its people.

11 **THE COURT:** Okay. On the 1985 claim, the
12 identification of a suspect class, I gave you sort of my
13 tentative view that you've got a problem on that claim. So
14 I'll give you an opportunity to address that one.

15 **MR. ROBINSON:** Your Honor, I think the case that
16 we -- we cite, there is a Ninth Circuit case, *Life Insurance*
17 *Company versus Reichert* (Phonetic), which suggests that -- it
18 cites, with approval, I believe, a Sixth Circuit decision
19 defining a class as people engaged in political protest.

20 And so that is --

21 **THE COURT:** Well, there's a problem with that being
22 the support here for your position, because I think that case
23 predated the -- what's developed in terms of the requirement
24 on identifying the suspect class in the way it's now required.
25 I would have to go back and look. But I'm pretty sure that

1 there's a timing problem with *Reichert* being the state of the
2 law in the Circuit.

3 MR. ROBINSON: So the -- the Circuit has deviated
4 from that view. It is -- *Reichert* is still on the books, it's
5 still --

6 THE COURT: Well, *Reichert* is, but the -- what you're
7 saying -- I mean, you're suggesting some earlier cases that
8 we're talking about -- I think you relied on that *Portland*
9 *Feminist Women's Center* case, Ninth Circuit case. And those
10 cases have been more or less put aside, haven't they? I mean,
11 they don't --

12 MR. ROBINSON: The recent authority is -- is to the
13 effect that it needs to be a suspect class. The more recent
14 authority goes that way. And I think we have -- you know, we
15 put it in; we have our argument. I understand --

16 THE COURT: A candid argument. I appreciate that.
17 Okay. All right. And you, would you agree that if -- if that
18 does apply, if you are required to identify a suspect class,
19 you know, I admire your effort. But we really don't have that
20 here. I mean, lawful gun owner group is not a suspect --
21 whatever one may say about that group, they're not a suspect
22 class. And, and those -- you know, carving out a group that
23 says people who protest against violence against women, you
24 know, a good cause, but it's not a suspect class.

25 MR. ROBINSON: I'm trying to find a way, Your Honor,

1 to gracefully submit on the tentative.

2 **THE COURT:** Okay. That's fine. You just did.
3 That's good. I will -- I will accept your gracious
4 submission. I'll look at it again. But I think I understand
5 the arguments.

6 So the only thing we haven't covered yet is statute of
7 limitations.

8 **MR. LANE:** Yes.

9 **THE COURT:** So go ahead, Mr. Lane.

10 **MR. LANE:** And Your Honor, would you like me to
11 address a particular issue, like the discovery order?

12 **THE COURT:** Well, delayed discovery seemed to be this
13 safe harbor, if you will, for Mr. Robinson. I mean, there's
14 some -- I had some question about -- you know, you attached --
15 I'm looking at my notes when I went over this.

16 You attached as an exhibit the denial of Mr. Zeleny's last
17 appeal. And that was back August 29th, 2017. And do you want
18 me to -- I assume that's what you want me to take judicial
19 notice of.

20 **MR. LANE:** Yes. Forgive me, Your Honor.

21 **THE COURT:** Okay, so --

22 **MR. LANE:** We actually weren't requesting judicial
23 notice; we just offered it to the Court for clarity because
24 the dates were all -- but we're fine with the Court taking
25 judicial notice.

1 **THE COURT:** Okay. Fine. Actually, are you asking
2 me, Mr. Robinson, to take judicial notice of this? Because
3 you made reference to it too, according to my notes.

4 **MR. ROBINSON:** Yes, Your Honor. We would ask that
5 you do take judicial notice of that.

6 **THE COURT:** Okay. So, and you don't have an
7 objection to my taking judicial notice.

8 **MR. LANE:** We do not, Your Honor. Public record.

9 **THE COURT:** All right. So we've all got August 29th,
10 2017 as the last -- as the date for the denial.

11 So the delayed discovery idea, according to what I read,
12 Mr. Zeleny is indicating that he didn't learn of this
13 conspiracy that he's identified or averred between the City and
14 NEA until much later. Although, you did make an allegation
15 against NEA in your case management conference statement in
16 back June of 2018. So as of then, you were already focused on
17 NEA being one of the bad actors here.

18 **MR. ROBINSON:** So to address that, I want to raise
19 two points. The first point is under conspiracy doctrine, the
20 statute of limitations runs from the last overt act in
21 connection with the conspiracy. NEA admits in its reply brief
22 that we've alleged at least one overt act that's occurred
23 within the statute of limitations period. Namely, the hearing
24 and denial of Mr. Zeleny's application the final time. And
25 this is another of those issues where we are confronted with

1 an affirmative defense that we don't think we need to plead
2 around, but I'm happy to fill in the facts.

3 Zeleny's permit application for a special events permit
4 was denied in this proceeding on August 29th. He submitted a
5 film application in September of 2017, well within the statute
6 of limitations period. Again, Chief Bertini, pursuant to, in
7 our view, the conspiracy with NEA, intercepted his permit
8 application, and has now sat on it since September of 2017. As
9 recently as the deposition and written discovery, the City
10 says: Oh, that's still under consideration; we just don't have
11 enough information to process it.

12 So it's not only an issue of the ongoing conspiracy. It's
13 an issue of a participant in the conspiracy continuing to take
14 overt acts even after this action was filed.

15 So it's -- NEA has conflated the idea of last overt act
16 with the idea of last overt act by NEA. If NEA is a party to a
17 conspiracy, the statute against NEA runs from any overt act by
18 any co-conspirator until NEA withdraws. And there's no
19 allegation that it has withdrawn. So the City's continuing to
20 engage in overt acts continues to move the statute of
21 limitations.

22 And NEA concedes that the August 19 through 29th -- not
23 entirely clear on what date -- but the permit denial that they
24 requested judicial notice of is an overt act, and occurred
25 within the statutory period. So --

1 **THE COURT:** Okay. Mr. Lane?

2 **MR. LANE:** Your Honor, let me start here, if I may.

3 The plaintiff has known of his core injury here, that NEA is
4 allegedly coordinating with the City to curtail or stop
5 Mr. Zeleny's protests or least stop them as long as they have
6 guns, for years. Years. In 2011 -- and this is attached to
7 our request -- our request for judicial notice -- NEA
8 disclosed to Mr. Zeleny they had surveilled him. And they had
9 given the City pictures from that surveillance.

10 Mr. Zeleny in his June, 2018, case management conference
11 which the Court referred to said since at least 2005, NEA has
12 enlisted the help of local authorities, including City, County
13 and Commander Bertini to silence him.

14 It goes beyond a CMC. In February, 2019, in seeking to
15 support his subpoena to NEA, the plaintiff said under oath that
16 he's been aware of NEA's (As read):

17 "...alleged past practices of using the legal system,
18 law enforcement and political influence to silence
19 me."

20 Again --

21 **THE COURT:** So that tells us how long, from your
22 perspective, Mr. Zeleny has had it in his mind that NEA is --
23 is out to get him. But then, according to Mr. Robinson, that
24 conduct continues all the way through; NEA's, in some form or
25 another, complicit in leading up to the denial of

1 Mr. Zeleny's -- the appeal of his denial, which takes us,
2 according to Mr. Robinson, all the way up through August 29 of
3 2017.

4 **MR. LANE:** So here, Your Honor, I think we need to
5 distinguish between the discovery rule for tolling and the
6 continuing violation rule.

7 We submit, under the discovery rule, Zeleny has said under
8 oath that he's been aware of NEA trying to work with local
9 authorities to shut him down for years.

10 **THE COURT:** Okay, that's the discovery side. And
11 then the continuing violation side, how come -- or why is
12 August of 2017 not another act on a continuum?

13 **MR. LANE:** Yes. And the reason is that in 2002, in
14 the *Morgan* case, the U.S. Supreme Court drastically limited
15 the continuing violation doctrine. It used to be under that
16 doctrine that serial violations against an individual by
17 different people and institutions at different times would
18 toll the running of the statute. *Morgan* rejected that. And a
19 year later, the Ninth Circuit in *Carpinteria* applied the
20 *Morgan* rule to 1983 cases.

21 And so under that rule, the plaintiff must plead -- to use
22 the continuing violation doctrine at all, the plaintiff must
23 plead a systemic policy or practice of discrimination before
24 and after the limitations period, which must be discriminatory
25 conduct that is widespread throughout a company -- *Morgan* was

1 an employment case -- or a routine and regular part of the
2 workplace.

3 Going on (As read):

4 "Discrete discriminatory acts by different people at
5 different times and at different institutions do not
6 fall within this doctrine."

7 And in no way, shape -- and plaintiff's complaint pleads
8 exactly such discrete discriminatory acts.

9 So under *Morgan*, absent a systemic policy or practice of
10 discrimination within an institution, since we no longer have
11 serial violation doctrine, the continuing violation doctrine
12 has no application under Section 1983. And that is why the
13 plaintiff here cannot use it. Again, quoting *Morgan*:

14 "Untimely retaliatory or discriminatory acts cannot
15 bootstrap onto timely allegations that are properly
16 before the Court."

17 **THE COURT:** Okay, Mr. Robinson.

18 **MR. ROBINSON:** Yes, Your Honor. We don't get to the
19 continuing violation doctrine. And the reason we don't get
20 there is the overt act doctrine is a separate doctrine that
21 governs when the cause of action accrues. It's not tolling;
22 it's not a continuing violation. It's: When does the cause
23 of action on a conspiracy claim accrue? And under Federal law
24 under the *Gibson* case in the Ninth Circuit, the cause of
25 action accrues from the last overt act by any of the

1 conspirators.

2 What that means is if you are part of a conspiracy, it
3 could well be that overt acts occurred 15 years ago. But if
4 there are continuing overt acts, a new cause of action runs
5 from each overt act that's part of the conspiracy. If there
6 are overt acts -- this is NEA's argument from its opening
7 brief. Zeleny alleges no overt acts that occurred after March
8 of 2017.

9 In fact, he does. He alleges the permit denial which we
10 have discussed. He alleges the interception of his film permit
11 in September of 2017. So if there are overt acts within the
12 statutory period, we may not be able to recover for acts
13 outside of the statutory period, but that's not a dismissal
14 issue. That's a what acts come in at trial or on motions.
15 It's not a ground to dismiss the complaint, if we have timely
16 overt acts. And NEA admits in its reply brief there is at
17 least one timely overt act, namely the permit denial. We could
18 allege more.

19 Frankly, under Ninth Circuit authority, we're not required
20 to plead around their defenses, but they've raised it. We can
21 plead overt acts going into September and beyond.

22 So the fact that there are overt acts within the statute
23 of limitations period which NEA acknowledges means that we
24 don't get to continuing violation. We don't get to tolling.
25 We can recover based on those overt acts, even if everything

1 else is barred. And those acts are sufficient to state a
2 claim. It's not a dismissal issue.

3 **THE COURT:** Okay.

4 **MR. LANE:** Your Honor, if I may?

5 **THE COURT:** Final comments, go ahead.

6 **MR. LANE:** Yeah, thank you.

7 So if I heard Mr. Robinson correctly, he's saying that all
8 that the plaintiff could proceed on with respect to statute of
9 limitations issues are overt acts that occurred from and after
10 March 29, 2017.

11 **THE COURT:** Which is the permit denial, and one other
12 thing.

13 **MR. LANE:** It's only -- the permits were denied in
14 2015 and 2016.

15 **THE COURT:** The appeal.

16 **MR. LANE:** That's just the appeal. And then
17 plaintiff claims there's some ongoing issue with his film
18 permit, which we don't understand.

19 But Your Honor, here is what I want to be clear about,
20 because Mr. Robinson was also right when he said: We argue that
21 there is no overt act after that magic date pled in this
22 complaint. And that is true. 139(d) says there were ongoing
23 actions -- there were ongoing discussions that led to a plan.
24 As I said, that just means there's a continuing conspiracy.
25 That's not an actionable overt act.

1 The plaintiff seeks to amend, he says, to allege that
2 Commander Bertini delayed his appeal period -- his appeal
3 hearing, forgive me -- so that it went into this later period,
4 post-March, 2017. It went to August, 2017. So now it's
5 actionable.

6 Well, I've attached to our reply brief the public record
7 which says that Commander Bertini didn't do that. There was a
8 hearing scheduled for September, 2016, to get this over with.
9 And it says that Mr. Zeleny's counsel -- not Mr. Robinson,
10 Mr. Affeld -- called to postpone it. That's on the public
11 record. And then, for whatever reason, the parties went
12 through forever to get it rescheduled for August 17th.

13 I don't know how the plaintiff can plead that in good
14 faith, that that was Bertini's action when the public record
15 says otherwise, or base any possible claim on it. They had a
16 scheduling snafu. The appeal was denied. That was by the City
17 Council, not a defendant here. It doesn't add up to a claim,
18 Your Honor.

19 **THE COURT:** Okay.

20 **MR. ROBINSON:** Can I very briefly address that?

21 **THE COURT:** One final-final, yes.

22 **MR. LANE:** The nets are getting smaller.

23 **MR. ROBINSON:** Your Honor can take judicial notice of
24 a government action, like a denial. The Court can't take
25 judicial notice of facts asserted by a defendant.

1 **THE COURT:** That's true. That is true. So --

2 **MR. LANE:** It's in the public record, Your Honor.

3 It's not something --

4 **THE COURT:** Well, something in the public record
5 doesn't mean everything in a document that's a public record,
6 I can take judicial notice of. I can take judicial notice of
7 a public record being filed on -- that this document was filed
8 on this date, and that type of thing.

9 But it is an overuse of judicial notice to say -- you
10 know, find some 20-page public document, take judicial notice
11 of it and everything that's in there is somehow judicially
12 noticeable, which it is not.

13 Now, in this instance, I'll go back and take a look at.
14 So to the extent that Mr. Robinson is suggesting that, for
15 example, your point seemed to be who was the party that was
16 prompting the continuance --

17 **MR. LANE:** The delay, yes.

18 **THE COURT:** -- I'm not sure -- I'll go back and look
19 at it -- that that is something that -- if there's a dispute
20 as to who was responsible for that, that is the kind of thing
21 that I might have some trouble taking judicial notice of. As
22 opposed to: Was there a hearing on X date, I can take
23 judicial notice of that. But, okay.

24 **MR. LANE:** Okay.

25 **THE COURT:** I will take the matter under submission,

1 and give you an order.

2 **MR. ROBINSON:** Thank you, Your Honor.

3 **MR. LANE:** Thank Your Honor.

4 **THE COURT:** Thank you.

5 (Conclusion of Proceedings)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Belle Ball

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Wednesday, June 26, 2019